INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Contract provisions involved	2
Statement	2
Reasons for granting the writ	10
Appendix	13

CITATIONS

Cases:

Callahan Walker Construction Co. v. *United States*, 317 U. S. 56 ..... 7, 13

Penner Installation Corp. v. *United States*, 114 C. Cls. 571, 116 C. Cls. 550, affirmed, 340 U. S. 898 11

United States v. *Moorman*, 338 U. S. 457 ..... 7, 13

United States v. *Rice*, 317 U. S. 61 13

United States v. *Wunderlich*, No. 11, this Term, decided November 26, 1951 ..... 10, 11, 12, 13

200096

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 466

UNITED STATES OF AMERICA, *Petitioner*

v.

THE GREAT LAKES DREDGE AND DOCK COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on May 1, 1951.

OPINIONS BELOW

The opinion of the Court of Claims upon the Government's motion to determine the issue of liability (R. 95) is reported at 116 C. Cls. 679. The opinion of the Court of Claims with respect to the amount of liability (R. 151) is reported at 96 F. Supp. 923.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1951 (R. 157). The Government's motion for a new trial was denied July 9, 1951. Upon the Government's motion, filed September 19, 1951, the Chief Justice extended the time for filing a petition for a writ of certiorari to December 6, 1951 (R. 160). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the determination by the head of the department of the amount of an "equitable adjustment" for work covered by a change order under a standard form government construction contract may be set aside by the Court of Claims in the absence of allegations, evidence, and findings of actual fraud, where the contract provides that the decision of the head of the department with respect to "all disputes concerning questions arising under this contract * * * shall be final and conclusive upon the parties."

CONTRACT PROVISIONS INVOLVED

The pertinent portions of the contract and specifications are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

This case arises out of a standard form government construction contract (R. 21). The discovery of latent subsurface conditions not shown in

the drawings or specifications resulted in a change order and the ultimate determination by the head of the department of an "equitable adjustment" for the change (R. 136-139). The contractor refused to accept the department head's determination and brought this suit in the Court of Claims which awarded a judgment in the amount of $442,541.34.

On November 22, 1935, the contractor, as the successful bidder, entered into a contract with the United States through the War Department for the construction of a lock on the Illinois River about 4½ miles below Peoria, Illinois (R. 104). The contract contained the customary provisions governing change orders (Article 3) and unforeseen conditions (Article 4), and in Article 15 provided that all disputes concerning questions arising under the contract should be decided by the contracting officer subject to appeal within 30 days to the head of the department, whose decision was to be final and conclusive upon the parties (R. 105-106).

The contract provided for the performance of the work in a cofferdam (R. 3, 109). After the contractor, through its own fault, had encountered other difficulties in dewatering the cofferdam, a spring broke through the surface of the water and, when the water was lowered to the floor of the cofferdam, particularly where it was punctured by pilings, numerous springs resulting from the presence of a water bearing stratum blanketed by a layer of impervious materials below elevation 410,

broke through the floor (R. 116-120). The existence of this subsurface condition was not apparent from the contract drawings which indicated the presence of only sand and silt to depths substantially below elevation 410 (R. 121).

The specifications provided for lowering of ground water under the foundation by means of a well-point system or by such other means as were approved by the contracting officer (R. 124). When less than half the contemplated well-points had been installed, the contractor concluded that the subsurface water was accumulated in too great concentration to permit drying the flow by the planned well-point system; it engaged the services of consulting engineers for advice on further procedure, and thereafter abandoned the well-point system as originally planned and undertook to unwater the cofferdam by a sump and drain system supplemented by the well-points already driven (R. 125-126).

From December 1936 to March 1937, the contractor filed various claims for additional compensation based upon the presence of a high content of clay in the foundation materials and the unusual flow of subsurface water, amounting to $467,424.25 (R. 134-135). The contracting officer found that there were no unanticipated conditions and denied the contractor's request for a change order and additional compensation (R. 135-136).

On appeal, the Chief of Engineers, as the authorized representative of the head of the depart-

ment, found that there were no unanticipated subsurface or latent conditions above elevation 410 but that the degree and concentration of ground water under hydrostatic pressure encountered below elevation 410 was unforeseen and constituted a change in latent conditions within the meaning of Article 4 of the contract (R. 137). The district engineer (the contracting officer) was instructed to prepare a change order to provide an equitable adjustment of contract prices and performance time based on the extraordinary quantities of subterranean water below the level of the lock floor (R. 137).

Thereafter, the contracting officer issued proposed change order 21 providing $65,261 for increased costs due to ground water conditions and allowing 26 days extension of time (R. 137). Other claims aggregating approximately $400,000, based upon other factors, were rejected (R. 137).

The contractor again appealed to the Chief of Engineers, as a result of which a meeting of all interested parties was held. At this meeting, a representative of the Chief of Engineers stated that the best way to determine the additional cost, due solely to the unforeseen ground water conditions, was to estimate the cost of a method which would deal only with that problem (R. 137). Thereupon, the feasibility and cost of installing a wellpoint system adequate to handle the water was discussed and the contracting officer was directed by

the representative of the Chief Engineers to prepare a change order on that basis (R. 137-138). The contractor's representatives made no objection to calculation and proposal being submitted to them (R. 138).

On April 18, 1939, the contracting officer issued a revised change order 21 for the difference between the cost of a well-point system adequate to handle the quantity of water reasonably to be anticipated at the time of the bids and the cost of a well-point system which would handle the water actually encountered (R. 138). He determined this difference to be 312 well-points and 2 pumps, at a cost of $60,447.86 (R. 138).

The contractor once more appealed to the Chief of Engineers, who this time directed the contracting officer to base the change order upon the use of an increased number of well-points; this resulted in a change order, on August 2, 1939, proposing the additional payment of $89,936.57 and an extension of time of 21 days (R. 138-139). This change order was approved by the Chief of Engineers (R. 139).

On December 11, 1941, the contractor requested the Chief of Engineers to reconsider the revised change order, stating that, without agreeing that the use of additional well-points would have been an efficient or successful method of performing the work, he would be willing to accept a change order predicated upon an adequate number of well-

points, provided the cost of the increased well-point system and the operations incidental to maintaining it was fairly and equitably set out therein (R. 139, Pl. Ex. 84). According to the contractor's calculations, this cost would have been $395,848.36 (*ibid*).

After the present suit had been instituted, the contractor received payment of the amount provided in the change order of August 2, 1939, without prejudice to its rights in this suit (R. 139). Before filing exceptions to the Commissioner's report, the Government moved to determine the issue of its liability on the ground that the department head's decision with respect to the amount of an equitable adjustment was, under the contract, final and conclusive and therefore binding upon the contractor under *United States* v. *Moorman*, 338 U.S. 457; *United States* v. *Callahan Walker Construction Company*, 317 U.S. 56, and other cases (R. 95).

In its opinion on this motion, the Court of Claims stated that "the sole issue presented is whether or not his decision was arbitrary and capricious" (R. 95). The court held "that the equitable adjustment allowed by the contracting officer and head of the department was wholly inadequate and was arbitrary and capricious and lacking in that impartiality demanded in the settlement of disputes arising between a plaintiff and the Government" (R. 98). It further held that

the Government was not justified in computing the equitable adjustment on the basis of additional wellpoints instead of the method actually employed and "that the decision of the contracting officer and the head of the department * * * was arbitrary and capricious and so grossly erroneous as to imply bad faith. When we say that bad faith is to be implied, we mean only what in *Penner Installation Corporation* v. *United States, supra* [114 C. Cls. 571, 116 C. Cls. 550, affirmed by an equally divided court, 340 U.S. 898], we said this expression connotes" (R. 99). It concluded that the contractor "is entitled to recover such amount as this court may finally determine is proper as an equitable adjustment on account of the latent conditions encountered which differed from those which plaintiff had a right to expect" (R. 99). The court agreed that the contractor was entitled to recover only for the excessive ground water and upheld the rejection of claims based upon other factors (R. 99).

In determining "what were plaintiff's increased costs and, therefore, what was the equitable adjustment to which it was entitled" the court acknowledged that the contracting officer and the head of the department "did determine what in their judgment was an equitable adjustment" (R. 153). It found this determination erroneous, however, in that it was based upon a hypothetical method which the Government believed would have

accomplished the work rather than upon the contractor's actual increased costs (R. 153). The court reasoned that the contract required an equitable adjustment to be based on actual increased costs, and, therefore, that the determination of the head of the department did not comply with the contractual requirements (R. 153, 154).

While rejecting the head of the department's computation of an equitable adjustment, the court also rejected the contractor's proof of its increased costs as excessive (R. 155). The court was of the opinion that part of the contractor's alleged increased costs was due to the fact that it had underestimated its bid, rather than to encountering subterranean water (R. 155).

The court then proceeded to determine the contractor's increased costs by deducting from its actual cost the average of the Government's estimate of costs and the four other bids received for the work (R. 155). Included in the contractor's "actual costs" was an item of $222,258.78 for overhead which amounted to more than 12% of the direct job cost. Although the court admitted that this charge to "actual costs" was "quite a sizeable item and a rather large percentage", it nevertheless allowed it in full (R. 156). After deducting numerous items of additional costs for which the contractor was held entirely responsible, the court approved the figure of $518,777.91 as the increased costs due to the subterranean water, and

held the contractor entitled to recover this amount less the sum paid under change order 21 (R. 156). The court also restored $13,700 which it held had been erroneously assessed for liquidated damages for delay in completing the work, and awarded judgment to the contractor in the amount of $442,541.34 (R. 156).

REASONS FOR GRANTING THE WRIT

This case presents essentially the same question as *United States* v. *Wunderlich,* No. 11, this Term, decided November 26, 1951. As in the *Wunderlich* case, the basic problem posed is whether the Court of Claims, rather than the legislative and executive branches of the Government, is to determine the procurement policy of the United States.

In the instant case, as in *Wunderlich,* the Court of Claims has made clear that it has departed from the standard of actual fraud as the sole basis for nullifying the contract finality provision, and that it has disregarded a determination made final and conclusive under the contract, although the determination represents the honest judgment of the contractually designated agent.

In its first opinion, written on the Government's motion to determine the issue of liability, the court did not even purport to consider fraud or bad faith the crucial issue. It stated, "The sole issue presented is whether or not his decision was arbitrary and capricious" (R. 95). Although the court sub-

sequently enunciated the formula that the head of the department's decision was "so grossly erroneous as to imply bad faith," it immediately explained that it did not mean actual bad faith but "only what in *Penner Installation Corporation* v. *United States, supra* [114 C. Cls. 571, 116 C. Cls. 550, affirmed by an equally divided court, 340 U.S. 898], we said this expression connotes" (R. 99).

The Government's brief in the *Wunderlich* case (pp. 28-29) points out that under the *Penner* reasoning, without proof or allegation of bad faith or fraud, lack of impartiality will be inferred from what the Court of Claims regards as substantial error, and bad faith will be inferred from the previously imputed lack of impartiality. By this reasoning, mere disagreement with the department head's determination can be the basis for voiding the contract's finality of disputes clause. The absence of fraud or bad faith in the present case is confirmed by the court's express recognition that the contracting officer and the department head "did determine what *in their judgment* was an equitable adjustment" (R. 153) (Italics supplied). What was implicit in the *Penner* decision is thus made explicit here.[1]

---

[1] To buttress its former opinion, the court below added, as a reason for denying conclusiveness to the department head's finding, that under the contract, the contractor was entitled to an equitable adjustment based upon the actual increase in cost resulting from the changed circumstances (R. 152), but that the contracting officer and the department head did not

Since the decision of the Court of Claims was not "founded on fraud, alleged and proved," and since it expressly negatives "conscious wrongdoing, an intention to cheat or be dishonest," which this Court in *Wunderlich* recently reaffirmed as necessary to read out of a government contract the finality of disputes clause, this petition for a writ of certiorari should be granted and the decision of the Court of Claims reversed without argument.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

---

attempt to ascertain actual additional costs (R. 153). This added ground of decision appears to be wholly without merit. In the first place, as the court below found, because the additional costs were due to a variety of factors, it was suggested by the representative of the Chief of Engineers "that the best way to satisfactorily evaluate plaintiff's claim *was to find a method of determining the additional cost due solely to ground water encountered in unusual quantities*" (R. 137) (italics supplied). "The feasibility and cost of installing a well point system adequate to handle the water was discussed", the contracting officer was directed "to prepare a change order based upon such a system", and plaintiff's representatives "made no objection to a calculation and proposal thereon being submitted to them." (R. 137-138.) Later the contractor expressed his willingness to accept a change order predicated upon an adequate number of well points, disputing only the calculations made under that standard (R. 138-139).

While the contractor never agreed to the change order that was finally issued, there is no suggestion in the findings that the issue between the parties was whether "cost" was the standard; the real dispute was as to the *amount* of additional cost incurred (R. 78-79, Pl. Ex. 84). That that was not a

APPENDIX

The pertinent contract provisions are as follows (R. 22-23, 28):

> ART. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the

---

simple problem appears from the lengths to which the court below went to determine additional actual costs, in part by averaging the bids of other contractors and the Government's estimate (see R. 155).

Secondly, in both *United States* v. *Callahan Walker Construction Co.*, 317 U. S. 56, and the *Wunderlich* case, *supra*, the contractors complained without avail that the "equitable adjustment" had been based not upon "actual costs" but upon some other computation. The determination of the dispute was nevertheless held to be within the scope of the finality clause relating to factual disputes. Such cases as *Wunderlich* and *Callahan Walker* are not to be distinguished on the ground that they arose under Article 3 and this case arises under Article 4 of the standard contract. "Both clauses essentially provide that, if changes are made affecting an increase or decrease of cost or affecting the length of time of performance, an equitable adjustment shall be made." *United States* v. *Rice*, 317 U. S. 61, 67.

Finally, Article 15 in this case did not limit the final determination of disputes to factual questions but expressly covered "all disputes concerning questions arising under this contract" (R. 106). The proper method of determining additional costs was the subject of dispute (R. 137-138) and the resolution of the dispute was therefore embraced by the finality clause even though the "equitable adjustment" in this case, contrary to former decisions, be deemed to involve a question of "law." Cf. *United States* v. *Moorman*, 333 U. S. 457.

time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once,

with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

ART. 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

☆ U.S. GOVERNMENT PRINTING OFFICE 1951—978083/P.O. 494

Office - Supreme Court,
FILED
FEB 1 1952
CHARLES ELMORE CROP
CLE

No. 466

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

THE UNITED STATES, *Petitioner,*

v.

THE GREAT LAKES DREDGE AND DOCK COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOSEPH J. COTTER
ARTHUR J. PHELAN
Attorneys for Respondent.

HOGAN & HARTSON,
On the Brief.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Preliminary Statement	2
Question Presented	3
Statement of the Case	4
Argument	7
No Conflict in Decisions	7
Breach of Contract Provisions by Petitioner	11
Administrative Finding Not Made in Accordance With Contract Provisions	11
No Government Procurement Policy Involved	12
Petitioner's Position Unfair and Unjustified	14
Conclusion	15

CITATIONS.

Brister & Koester Lumber Co. v. U. S. 188 F. Rep. 2d, 986 10
Callahan Walker Construction Co. v. U. S. 317 U.S. 56 ..... 7, 9, 10
Cruise v. City and County of San Francisco, 101 C. A. 2d, 558, 565 14
Penner Installation Corp. v. U. S. 340 U.S. 898 ..... 7, 8
Penrose v. Howbert 38 F. 2nd 577, 581 15
Rock Island, etc. RR. Co. v. U. S. 254 U.S. 141 15
U. S. v. Moorman 338 U.S. 457 ..... 7, 8, 9, 10
U. S. v. Rice 317 U.S. 61 ..... 7, 9
U. S. v. Wunderlich No. 11, This Term decided Nov. 26, 1951 ..... 7, 9, 10, 12
48 Harvard Law Review 1299 15

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 466

THE UNITED STATES, *Petitioner,*

v.

THE GREAT LAKES DREDGE AND DOCK COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinions of the Court of Claims are published in respectively 116 C. Cls. 679 and 96 F. Supp. 923.

JURISDICTION.

The judgment of the Court of Claims was entered May 1, 1951 (R. 157). The Government's motion for a new trial was denied July 9, 1951. The Chief Justice extended the time for filing a petition for a writ of certiorari to December 6, 1951 (R. 160). The jurisdiction of this Court is attempted to be invoked under 28 U. S. C. 1255.

PRELIMINARY STATEMENT.

In the summer of 1936 respondent encountered latent conditions during the performance of a Government contract for the construction of a lock inside a cofferdam on the Illinois river near Peoria, Illinois viz. excessive water. Under article 4 of the contract this obligated the contracting officer to direct what should be done to meet those conditions and to make equitable adjustment of the contract price and time accordingly. This he refused to do, denying that any latent condition had been encountered. Plaintiff thereupon, with the approval of the contracting officer, abandoned a well point system which it had planned to use and instead adopted a sump and drain system for drying the floor of the cofferdam. It never was able to control the water.

In October, 1937, the head of the department reversed the contracting officer, found that latent conditions had been encountered and directed that equitable adjustment of contract price and time be made accordingly.

In 1939 the head of the department approved a change order prepared by the contracting officer providing for additional payment of about $90,000 to respondent and an extension of time. This was based upon the theory that had respondent used additional well points instead of the sump and drain system, the use of which latter the contracting officer had approved, its costs might have been less than they actually were.

The Court of Claims stated (R. pp. 153-154):

> "The making of an equitable adjustment on this theory, however, was not a compliance with the provisions of the contract, which provided that 'any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract,' that is to say, equitably adjusted. The equitable adjustment contemplated by the article, however, was an equitable adjustment based on actual increased cost, and not on what plaintiff's

increased costs might have been had some procedure different from that adopted and approved been used to take care of the unexpected conditions."

"The making of the equitable adjustment, based upon this supposition of what plaintiff's increased costs might have been, was not a compliance with the contractual requirement. In a case such as this, where the contracting officer approved plaintiff's method of operation, and where we have found that the plaintiff's actual increased costs were necessary and reasonable, we think the contract contemplated that those actual costs, and not the costs of some hypothetical alternative solution of the problem, should be the basis of the equitable adjustment. For this reason, in addition to the reason stated in our former opinion, we think the finding of the contracting officer and the head of the department as to what was an equitable adjustment was not conclusive. He did not determine the equitable adjustment as the contract required, and, hence his determination is not entitled to the conclusiveness accorded by the contract to determinations made in accordance with its terms. Only determinations made in accordance with the contract are conclusive."

QUESTION PRESENTED.

The Petition states that the question here presented is (p. 2):

"Whether the determination by the head of the department of the amount of an 'equitable adjustment' for work covered by a change order under a standard form Government construction contract may be set aside by the Court of Claims in the absence of allegations, evidence and findings of actual fraud where the contract provides that the decision of the head of the department with respect to 'all disputes arising under this contract * * * shall be final and conclusive upon the parties'."

But that is not the question presented here. The questions presented here are:

1. Does a finding made not within or pursuant to but inconsistent with and contrary to the terms of the contract preclude court review?

2. Does a finding based upon hypothetical assumptions, without respect to respondent's actual costs, preclude review?

3. Can a finding by the head of the department, made in 1939, two years after the contract work was completed and accepted, based upon the theory that respondent, upon encountering latent conditions in the summer of 1936, should have adopted a method of meeting those conditions which the contracting officer did not at any time direct respondent to adopt, although it was his duty and obligation to do so under Article 4 of the contract "at once" when the latent conditions were encountered, which finding does not and does not purport to find respondent's actual additional cost, preclude court review, especially in light of the fact that the contracting officer approved, under authority given him by the contract, the method actually used by respondent?

4. Does the finality provision of Article 15 render effective for any purpose a finding which is a nullity under Article 4?

STATEMENT OF THE CASE.

In the summer of 1936 respondent encountered a latent condition (subterranean water under hydrostatic head, R. 120) resulting in the floor of the cofferdam becoming liquid mud; its men were obliged to work waist deep in mud and water and at times had to strip and work without clothes; its equipment had to be supported by corduroys made of wooden piling or cribbing topped with wooden mats as much as five feet thick to keep it from sinking into the muck (R. 127).

The contracting officer "and the defendant's engineers in charge at the site knew, concurrently with their occurrences, of the difficulties plaintiff was encountering in relation to the mud and water, but did not consider that the amount or character of the flow constituted a changed condition or that it was other than a condition which plaintiff reasonably might have anticipated" (R. 132). The contracting officer testified at the trial of this case (Tr. pp. 1048-1049) that in view of the fact that he had denied the existence of latent conditions during the progress of the work, respondent could have gotten no relief from him under Article 4 of the contract.

On January 14, 1937, the contracting officer wrote respondent in reply to its request that action be taken in accordance with Article 4 of the contract and to its various claim letters, that he could see no justification for making any contract changes or allowances and advised respondent of its right of appeal (R. 135-136).

Respondent appealed and on October 30, 1937, the head of the department reversed the contracting officer, found that the ground water under hydrostatic pressure constituted a "change in latent conditions" under Article 4 and directed that a change order be prepared to provide an equitable adjustment of price and time accordingly. (R. 136-137). This ruling was made after practically all of the work had been done. (R. 97)

On September 25, 1939, the head of the department approved a change order prepared by the contracting officer providing for the payment to respondent of an additional sum of about $90,000 and an extension of time of 21 days. This change order stated:

> "I find the effect on your contract operations of extraordinary quantities of ground water below the level of the lock floor to be the difference in cost between a well point system designed and operated in accordance with good practice and adequate to handle the quantity of water which should reasonably be expected from an intelligent survey of the information available

to you at the time the bids were opened, and the cost of a well point system which would handle the quantity of water encountered during the construction of the lock, which difference has been determined to be 555 well points and two pumps." (R. 138-139).

The contract specifications provided (R. 153):

2-01(b). Leakage within the cofferdam shall be controlled by a system of well points, drains, sumps, and pumps, as approved by the contracting officer.

3-05. Lowering of ground water under foundations shall be accomplished by means of a well point system, or by such other means as are approved by the contracting officer.

The contracting officer approved the sump and drain system adopted by respondent as well as the abandonment of the well point system (R. 154)[1] But several years later,

---

[1] The Petition states (footnote, p. 12):

"'The feasibility and cost of installing a well point system adequate to handle the water was discussed', the contracting officer was directed 'to prepare a change order based upon such a system', and plaintiff's representatives 'made no objection to a calculation and proposal thereon being submitted to them.' R. 137-138."

The reference to what plaintiff's representatives did is not complete. The complete sentence in the first paragraph on Record page 138 is:

"*Plaintiff's representatives did not agree at the meeting to accept a determination based on such a method,* but made no objection to a calculation and proposal thereon being submitted to them." (Italics ours.)

The Petition states (footnote, p. 12):

"Later the contractor expressed his willingness to accept a change order predicated upon an adequate number of well points, disputing only the calculations made under that standard (R. 138-139)."

The Petition is here referring to respondent's letter to the Chief of Engineers dated December 11, 1941 (see Petition, bottom p. 6). As shown by its date, this letter was written four years after the

when respondent's claim for additional costs was before the administrative officers, they then adopted as the basis for compensating respondent the assumed cost of installing a number of hypothetical well points, which of course was an afterthought—thought of after the job had been done. (R. 38)

ARGUMENT.

No Conflict in Decisions.

The Petition states no reason or basis, supported by the record, necessitating or justifying review.

The basis of the Petition is asserted conflict with decisions of this Court. There is no such conflict. The only opinions cited are *Callahan Walker Construction Company* v. *U. S.*, 317 U. S. 56, *Penner Installation Corp.* v. *U. S.*, 340 U. S. 898, *U. S.* v. *Moorman*, 338 U. S. 457, *U. S.* v. *Rice*, 317 U. S. 61, and *U. S.* v. *Wunderlich*, No. 11 this Term, decided November 26, 1951.

The question in *Callahan Walker* was whether the contractor was entitled to be paid for constructing a berm under a change order at the cubic yard price provided in the contract or at a higher price claimed by the contractor.

The contractor did not appeal from the decision of the contracting officer.

---

completion and acceptance of the contract work. It was simply another one of the many efforts made by respondent to reach a settlement with Petitioner through its administrative officers and to avoid litigation. It was an offer of compromise which was not accepted by Petitioner and it specifically disavowed any thought that a well point system instead of the sump and drain system actually used by respondent would have answered the purpose. The letter stated:

> "Of course, the above is all based on the theory, which is an afterthought, and to which, as stated, we do not subscribe, that a well point system of sufficient capacity would have overcome the unexpected conditions encountered." (Pltfs. Ex. 84)

This unaccepted offer of compromise has no proper place here. It is dragged in by Petitioner in an effort to bolster the weak and unjustifiable position which it has taken.

This Court held that the contracting officer had given consideration to the *cost* of the extra work and reached a decision about it and that "an equitable adjustment of respondent's additional pay for extra work involved merely the ascertainment of the *cost* of digging and moving and placing earth, and the addition to that *cost* of a reasonable and customary allowance for profit. These were inquiries of fact. If the contracting officer erroneously answered them, Article 15 of the contract provided the only avenue for relief." (Italics ours.)

This Court affirmed the decision of the Court of Claims in the *Penner* case.

In the *Moorman* case the question was whether or not the contract required contractor to grade a certain taxi-way. The contractor contended that it did not. The contracting officer considered contractor's contention, disagreed with it, decided that the work was within the contract and required it to be performed. Upon appeal to the head of the department the contracting officer's decision was affirmed. The Court of Claims found for the contractor. This Court reversed on the ground that the contracting officer, having made his finding and that finding having been sustained on appeal by the authorized representative of the head of the department, the Court of Claims erred in reviewing the question so decided.

The contract in the *Moorman* case contained a provision stating:

> "If the contractor considers any work demanded of him to be outside the requirements of the contract * * * the contractor shall * * * submit his protest thereto in writing to the contracting officer * * *. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon."

and it provided for appeal to the Secretary of War, whose decision "shall be final and binding".

Irrespective of what might be thought as to the correctness or otherwise of the administrative findings in the *Moorman* case, those decisions were definite determinations of a question which arose under and within the terms of the contract, viz: was or was not the work "outside the requirements of the contract?" The contract provisions required that the administrative officers decide that very question, and they did so. This Court held their decision final in the absence of fraud.

The *Rice* case is cited in the Petition (footnote, p. 13) in support of the statement that "such cases as *Wunderlich* and *Callahan Walker* are not to be distinguished on the ground that they arose under Article 3 and this case arises under Article 4 of the standard contract. Both clauses essentially provide that, if changes are made affecting an increase or decrease of cost or affecting the length of time of performance, an equitable adjustment shall be made."

What this Court considered in that case was whether a contractor was entitled to recover for cost of delay not occasioned by it and the Court in effect held that it was not so entitled under either Article 3 or Article 4.

The *Callahan Walker* and *Wunderlich* cases are distinguished independently of any difference between Articles 3 and 4.

The only question considered by this Court in the *Wunderlich* case was whether the finding of the head of the department was conclusive under Article 15 in the absence of allegation of fraud, finding of fraud and a request for such finding, and the Court held that it was conclusive. The briefs of both the Government and the respondent stated that this was the question presented. No question was raised in either the prevailing or dissenting opinion that the administrative finding was one made in accordance with and pursuant to the provisions of the contract.

In none of the above cases did the Court discuss, consider or decide any such situation as is involved in the instant case.

It is patent that the decisions of this Court in the *Callahan Walker*, the *Moorman* and the *Wunderlich* cases considered and decided only that administrative findings made pursuant to and in accordance with the provisions of the contract are final. In the *Callahan Walker* case the finding was one of actual *cost* of the extra work, in the *Moorman* case it was whether or not the contract provided for the doing of certain work, and in the *Wunderlich* case it was a determination of the cost to the contractor of the use and maintenance of its machinery engaged in extra work.

In none of these cases is there even an apparent conflict with the decision below in the instant case. In fact, so far as decisions of this Court are concerned, the instant case is sui generis. We have found no conflict between the decision herein below and any other decision below and the Petition cites none.[2]

The only opinion of this Court now cited by petitioner which the Court below did not have before it when it decided the instant case is that in the *Wunderlich* case. And in that case this Court did nothing more than adhere to its previous decisions in cases involving facts similar to those in the *Wunderlich* case, such as the *Moorman* case. Those decisions held that findings of administrative officers made in accordance with the contract provisions are final in the absence of fraud. This, of course, was so before the *Wunderlich* decision, and the opinion of this Court in that case has no more relevance to the state of facts in the instant case than does any of its prior opinions.

---

[2] There is a line of cases in the Court of Claims followed by the United States Court of Appeals District of Columbia in *Brister & Koester Lumber Co.* v. *U. S.*, 188 F. 2d, 986, which, as stated in that case, "hold that where there is in a contract with the Government a clause providing that the decision of a certain official shall be final and conclusive, but that official fails or refuses to make any decision, such failure or refusal constitutes a breach of the contract and suit will thereupon lie".

Breach of Contract Provisions by Petitioner.

From the foregoing statement of the case it is inescapable that the contracting officer breached the terms of the contract when the latent conditions were encountered in the summer of 1936. Article 4 provided that "he shall at once * * * make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract." Respondent at that time was entitled by the terms of the contract to the advice and direction of the contracting officer as to what should be done to meet the latent conditions encountered and to an equitable adjustment. But the respondent did not get either, for, as shown above, the contracting officer denied any latent conditions had been encountered and refused to give any such advice or direction or to make any such adjustment.

Administrative Finding Not Made in Accordance With Contract Provisions.

The finding, if it can be so designated, contained in the change order approved September 25, 1939, was not a compliance with the contract requirements and has been found not to be such compliance by the Court below (Finding 69, R. p. 151; R. pp. 152-154). It was not such a compliance, for:

1. If it was the contracting officer's judgment in 1936 that additional well points should be used to overcome the latent conditions, it was not only his right but it was his duty, his obligation, under Article 4, to at once, that is, in the summer of 1936, direct respondent to install them.

2. Article 4 required that the contracting officer, upon the encountering of latent conditions, "shall at once" make the necessary changes in the drawings or specifications "and any increases or decrease of the *cost* * * * resulting from such changes shall be adjusted as provided in Article 3 of this contract." The change order does not and does

not purport to deal with any *cost* incurred by respondent. There is no question that the amount of money for which the Court below has given judgment was expended by respondent and expended in overcoming the latent condition. The head of the department has not found that it was not, and petitioner's own auditor at the trial of the case testified that the expenditures had been made. (Tr. of Test. p. 1334) But the contention here is that if respondent had used another method its costs would have been different. Of course, this is no finding of *cost*. What it amounts to is that the contracting officer says in 1939, two years after the contract had been completed and accepted, that if respondent had done in 1936 something which it was the contracting officer's duty and obligation then to direct respondent to do, but which he did not so direct, respondent's costs might have been so much.

To consider this change order a contract finding precluding respondent from obtaining court review it would be necessary to torture a patent, palpable violation of the contract terms into a compliance with those terms.

No Government Procurement Policy Involved.

The Petition states that (p. 10):

> "As in the *Wunderlich* case, the basic problem posed is whether the Court of Claims, rather than the legislative and executive branches of the Government, is to determine the procurement policy of the United States."

What is involved here has not the remotest relationship to any "procurement policy of the United States." The United States can adopt such procurement policy as it sees fit, but it cannot violate or breach its undertakings with its citizens without responsibility or liability. This Court has held that the Government is within its right in inserting Article 15 in its contracts. Without here questioning that right, we submit that it cannot be said that contractors will-

ingly accept the article; they submit to it because they cannot do otherwise and obtain Government contracts, and the Government is the largest procurement entity in the world. We do submit that this Court should not invoke Article 15 in this case where it is clearly not applicable, when the total result of such invoking would be to do patent injustice to respondent.

No one would deny that the contracting officer had obligations to respondent under the terms of the contract when latent conditions were encountered, and it is not now denied by anyone that he failed to comply with or discharge those obligations at that time.

The contracting officer in this case was beyond question partial, unfair and dishonest insofar as his obligation to respondent was concerned. No one could have seen what he saw—men working up to their waists in mud and water, some naked; machines necessarily supported by structures five feet thick to keep them from disappearing in the muck; water spouting through the surface (at one place it burst through the concrete floor which respondent had constructed and created a crater which was so large that it took the whole of a post office building which was being torn down in Peoria to fill it, this done with the approval of the contracting officer)—and have decided honestly that no latent condition had been encountered. (Tr. Test. p. 138.) The contracting officer was simply seeing to it that the job that was being done under his supervision did not suffer financially for the mere purpose of doing justice to respondent. It is perfectly patent that he did not intend that respondent should be paid anything on account of its expenditures made in meeting an exceedingly difficult situation resulting from the subterranean water, and of which he was always cognizant, and which the head of the department found later did constitute a latent condition, for meeting and overcoming which respondent was entitled to be compensated.

There is irreversible authority for the conclusion that a man cannot serve two masters, which, of course, the con-

tracting officer was called upon to do herein under Article 15. Whether what he did amounts to fraud before this Court we submit is immaterial, for assuredly Article 15 cannot make a finding final where there is no finding. That article surely does not abrogate or repeal all of the other contract articles.

Petitioner's Position Unfair and Unjustified.

The contracting officer had the duty and obligation of directing respondent to use the additional well points when the latent condition was encountered in the summer of 1936, if in his judgment that was the effective manner to overcome the latent condition then encountered and of then making an equitable adjustment. This is beyond question, for the head of the department later found that the latent condition had been encountered. But the contracting officer did not do so. Surely he and the head of the department are estopped to say in 1939 that respondent should have used the additional well points in 1936 and to base an equitable adjustment upon the theory that they should have been used. Respondent could have used the additional well points had the contracting officer so directed without respondent incurring liability by reason of their use in the event of their failure. Respondent was of the opinion that the well points would not have been successful in meeting and overcoming the latent condition.

In addition, it had been advised by consulting engineers, whom it called in especially to advise it how best to meet the latent condition encountered, not only that the well points would not be successful but that the continued use of well points might so endanger the foundation that the lock could not have been successfully built. (R. 66; Tr. Test 566.) The contracting officer was cognizant of everything that went on.

As recently stated in the case of *Cruise* v. *City and County of San Francisco,* 101 C. A. 2d, 558, 565: "Whether an estoppel exists against the Government

should be tested generally by the same rules as those applicable to private persons. The Government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. The Government should be an example to its citizens, and by that is meant a good example and not a bad one."

There can be no doubt but that there are many instances in which an equitable estoppel in fact would run against the Government where justice and right require it. This is only logical.

> "If we say with Mr. Justice Holmes, 'men must turn square corners when they deal with the Government' it is hard to say why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'"[3]

The position that the Government is attempting to assert in the case at bar is anything but "square".

CONCLUSION.

The Court below has given complete recognition and effect to the only finding made by the head of the department in accordance with the terms of the contract, that of October 30, 1937, in which he found respondent entitled to be paid for its additional cost in meeting the latent condition which he found to exist. The judgment is for the amount of that cost, which no one contends was not incurred. No administrative finding as to what that cost was is before the Court. There is no conflict of opinion and no need for review here as a guide to courts below, for there has been no similar case nor is there likelihood that there will be in the future. What was done administratively so shocks the conscience that a repetition of it is not apt to occur. Justice has been done below and even though it had

[3] 48 Harvard Law Review 1299; *Rock Island, etc. Railroad Co.* v. *U. S.*, 254 U. S. 141; *Penrose* v. *Howbert*, 38 F. 2d. 577, 581.

not been done, this Court does not grant review for the sole purpose of administering justice in a particular case.

There is no basis for review, and we respectfully but urgently submit that the Petition should be denied.

JOSEPH J. COTTER
ARTHUR J. PHELAN
Attorneys for Respondent.

HOGAN & HARTSON,
On the Brief.

Filed Feb. 1, 1952.